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NO. 82-1528

SUPREME COURT OF THE UNITED STATES
October 1982 Term

* *

STANTON A. TISDALE,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Agency/Respondent

and

OWENS-CORNING FIBERGLAS CO. and AETNA CASUALTY INSURANCE CO.,

Employer-Carrier/Respondents

and

LOCKHEED SHIPBUILDING & CONSTRUCTION CO. and EMPLOYER'S INSURANCE OF WAUSAU,

Employer-Carrier/Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

* *

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Should A Longshore And Harbor Workers' Claim For Hearing Loss Caused By Years Of Exposure To Noise At Work Be Denied Solely Because A Later Injury Results In Total Loss Of Wage Earning Capacity?

II. LIST OF PARTIES

1. Stanton A. Tisdale
2. Lockheed Shipbuilding & Construction Co.
3. Employers' Insurance of Wausau
4. Owens-Corning Fiberglas Corp.
5. Aetna Casualty Insurance Co.

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B. Decision By Benefits Review Board Dated January 31, 1981, Affirming The Ruling Of The Administrative Law Judge With One Member Dissenting. Tisdale v. Owens-Corning, 13 BRBS 167 (1981).

C. Memorandum Decision, United States Court Of Appeals For The Ninth Circuit, Cause Nos. 81-7178, 81-7227, filed December 16, 1982, Affirming The Benefits Review Board, Judge Hug, Dissenting.

VI. STATEMENT OF JURISDICTIONAL GROUNDS

A. Judgment Was Entered And Filed By The United States Court Of Appeals For The Ninth Circuit On December 16, 1982.

B. Jurisdiction Is Conferred On The Court Per Title 28 U.S.C. § 2101(c) Permitting A Writ of Certiorari From A Judgment Of The Court Of Appeals Taken Or Applied For Within Ninety Days Of The Entry Of Such Judgment. Jurisdiction Is Further Provided

Under Rule 17.1(c) Of The Rules Of The Supreme Court.

VII. STATUTES

33 U.S.C. § 908:

Compensation For Disability:

Section 8. Compensation for disability shall be paid to the employee as follows:

> (a) Permanent Total Disability: In case of total disability adjudged to be permanent, 66-1/2 percentum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.
>
> . . .
>
> (c) Permanent Partial Disability: In case of disability partial in character but permanent in quality the compensation shall be 66-1/2 percentum of the average weekly

> wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively, and shall be paid to the employee, as follows:
>
> . . .
>
> (c) (13) Loss of Hearing: Compensation for loss of hearing of one ear, 52 weeks. Compensation for loss of hearing of both ears, 200 weeks.

VIII. STATEMENT OF THE CASE

A. Procedural Facts

Petitioner, Stanton A. Tisdale, was injured on April 14, 1977, when he fell from a scaffold while working for Owens-Corning Fiberglas Corp. His injuries caused permanent total disability and he never returned to work after that date. Subsequent to the fall, Mr. Tisdale was diagnosed as having work-related, noise-induced hearing loss. This loss was not the result of the fall, but rather the

result of his long years of work as a boilermaker. Mr. Tisdale, therefore, also made a claim for a scheduled award under 33 U.S.C. § 908(c)(13) for this hearing loss.

After a hearing on the claim, the Administrative Law Judge denied the scheduled award. The basis of the denial was that a worker could not make a claim for a scheduled award such as hearing loss when the worker was already receiving monthly total permanent disability payments for loss of his wage earning capacity. This ruling was affirmed by the Benefits Review Board in a two to one decision rendered on January 31, 1981. The decision of the Benefits Review Board was upheld on appeal to the United States Court of Appeals for the Ninth Circuit in a memorandum opinion filed on December 14, 1982, with Judge Hug dissenting.

B. Statement Of Facts

Stanton A. Tisdale was born in 1914, and had been in the shipbuilding trade most of his working life. The shipbuilding trade, by its nature, exposes the worker to a significant amount of noise and there is no evidence in the record to dispute that this was the case for Mr. Tisdale. Mr. Tisdale's first job as a boilermaker began in 1937. His job involved riveting, bending and drilling metal. He worked in shipyards during the 1940's and basically continued to work in trades with significant noise exposure up through a serious leg injury which occurred at Lockheed in 1964. From 1974 to 1977, Mr. Tisdale returned to work as a boilermaker for Lockheed Shipbuilding & Construction Co. On March 29, 1977, he went to work for Owens-Corning Fiberglas Corp., and worked there for ten days. During that time he was exposed to some noise, but not at significant levels.

On April 14, 1977, Mr. Tisdale fell from a scaffold, sustaining injuries which prevented him from returning to any kind of work. It is clear from the record that Mr. Tisdale's noise-related hearing loss was sustained prior to his going to work for Owens-Corning Fiberglas Corp. For example, in his work at Lockheed, Mr. Tisdale worked in the plate shop, a "block-long" building, where he rolled, straightened, fit and cut steel plates. Mr. Tisdale reports having worked in the plate shop in the years prior to 1974 as well.

Although the impairment in his hearing was clearly present for many years prior to his injury on April 14, 1977, the extent of this loss, and the fact that it was related to noise on the job, was not diagnosed by a medical doctor until May 1977, approximately a month after his fall from the scaffold. It was the failure to

have the hearing loss diagnosed at an earlier point in time which has led to denial of the scheduled award benefits.

The Administrative Law Judge found Mr. Tisdale did have a hearing loss which was noise-induced and job-related. This finding was affirmed by the Benefits Review Board. Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167, 169-171 (1981). Despite this finding, however, the Administrative Law Judge, the Board, and the Ninth Circuit Court of Appeals denied the scheduled award under 33 U.S.C. § 908(c)(13) based on the fictional legal conclusion that Mr. Tisdale's hearing loss did not "occur" prior to his becoming totally disabled on April 14, 1977, the date he fell from the scaffold.

IX. BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jurisdiction for review of the Decision and Order of the Benefits Review

Board by the United States Court of Appeals for the Ninth Circuit was provided by 33 U.S.C. § 921(c).

X. ARGUMENT

A. Denying Mr. Tisdale Benefits For His Hearing Loss Directly Conflicts With The Supreme Court's Decision in Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs.

33 U.S.C. § 908 provides separate remedies for total loss of wage earning capacity and permanent partial loss of function. There is no indication, express or implied, that the § 908(a) provision for total loss of wage earning precludes an award for hearing loss under § 908(c) incurred concurrent with or prior to the total loss of earning capacity. The Supreme Court in Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 66 L. Ed.2d 446, 101 S. Ct. 509 (1980) [hereinafter cited as Pepco] ruled that

scheduled awards under 33 U.S.C § 908(c)(1)-(19) are exclusive remedies. Pepco, 449 U.S. at 283, 66 L. Ed.2d at 458, 101 S. Ct. at 517. Although the specific question of scheduled awards which would overlap in time with total permanent disability payments was not before the Court, the Court recognized that if an employee's injury comes within the schedule, "the injured employee is entitled to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired." Pepco, 449 U.S. at 270, 66 L. Ed.2d at 449, 101 S Ct. at 510. The Court also acknowledged that in some instances a scheduled award will result in no loss of wages, i.e., a worker could continue to receive the same or even higher wages and still be entitled to a scheduled award.

The same principle applies to a

worker entitled to a scheduled award for hearing loss which occurred concurrent with or prior to a permanently disabling injury. An award based on loss of function is not linked to a worker's loss of wage-earning capacity.

The Supreme Court held that "the schedule . . . mandates that the compensation prescribed by the schedule 'shall be paid to the employee . . . ' We are not free to read this language as though it granted the employee an election." Pepco, supra, 449 U.S. at 275, 66 L. Ed.2d at 452, 101 S. Ct. at 513.

Nor should such mandatory language be read to grant the employer an election between scheduled awards and total permanent disability payments. The responsible employer for Mr. Tisdale's job-related, noise-induced hearing loss should not fortuitously profit because he did not discover his right to a scheduled award

until after he became permanently totally disabled. Analogously, concurrent awards for both permanent partial and permanent total disability are permissible. See, also, Hastings v. Earth Satellite Corp., 628 F.2d 85 (D.C. Cir. 1980); State Ex Rel Consolidation Coal Co. v. Industrial Commission of Ohio, 62 Ohio St.2d 147, 404 N.E.2d 141 (1980); State Ex Rel Latino v. Industrial Commission of Ohio, 13 Ohio St.2d 103, 234 N.E.2d 912 (1968); Morgan v. Marine Corps Exchange, 10 BRBS 442 (1979).

The ruling of the Court of Appeals results in the unequal treatment of workers disabled in exactly the same manner, if one of the two workers had the loss of function diagnosed at a later date.

For example, assume that a worker had the exact same work history as Mr. Tisdale, including development of noise-related hearing loss. Let us further

assume that this worker sustained a totally disabling injury on the same date as Mr. Tisdale, April 14, 1977. If this worker went to a doctor and had his condition diagnosed in 1976, the worker would have filed a claim for hearing loss and collected a scheduled award benefit in addition to the later benefits he was to receive for his loss of wage-earning capacity.

It is important to note that a prior scheduled award of benefits is never taken away from a worker, even though that worker later becomes totally disabled. See, McGowen v. Pacific Employer's Ins. Co., 205 F.2d 533, 534 (5th Cir. 1953); McKamey v. Pee Wee Mining Co., 498 S.W.2d 94 (Tenn. 1973); Harbor Ins. Co. v. Industrial Commission of Arizona, 24 Ariz. App. 197, 537 P.2d 34 (1975).

It is a completely strained and unsupportable interpretation of the

Longshore & Harbor Workers' Compensation Act to find that the Congress intended to discriminate between workers based upon the fortuitous event of when their condition was diagnosed by a doctor.

Under this analysis, Mr. Tisdale should be entitled to his scheduled award for work-related hearing loss whether it was incurred on or before the date he became totally disabled. If the Supreme Court rules that only permanent partial disability incurred prior to the totally disabling injury is compensable, however, then he is still entitled to compensation.

B. There Is No Substantial Basis For Concluding That Mr. Tisdale's Hearing Loss Occurred On Or After His Injury Of April 14, 1977.

Judge Hug, in his dissenting opinion to the Memorandum decision of the Court of Appeals, vigorously dissented from the conclusion that the hearing loss was not present until on or after the April 14,

1977, injury. He agreed with dissenting Judge Miller of the Benefits Review Board, that it "tortures realistic thinking to conclude that the hearing loss 'occurred in the serene atmosphere of a physician's office while claimant was being diagnosed.'." Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS at p. 175, n.2, supra. Judge Hug felt it was important to note the obvious -- i.e., "that the binaural loss of hearing due to injurious noise at the work place occurred before the fall from the scaffolding on April 14."

Judge Hug's dissent rationally noted that while the conclusion that there were some problems with Mr. Tisdale's left ear which were related to his fall, that the medical evidence clearly established that the binaural hearing loss occurred prior to the fall. Tisdale v. Director, OWCP, et al., Dissent to Memorandum Opinion, at p. 2 (9th Cir., Dec. 16, 1982). He

concluded that the extent of disability which existed prior to the fall may be in question, but not the existence of such disability. Tisdale v. Director, OWCP, et al., Dissent to Memorandum Opinion, at p. 3 (9th Cir., Dec. 16, 1982).

The Court of Appeals majority in its Memorandum opinion does accept that a prior permanently partially disabling condition is compensable. However, they then proceed to take the liberal and flexible approach used to establish a "time of injury" for occupational diseases and stand that approach on its head in order to deny Mr. Tisdale benefits in this case.

The majority also makes a key error of logic in evaluating the findings of the Administrative Law Judge. First, the Memorandum decision reviews the test for "time of injury" discussed in Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981).

The opinion attempts to apply the tests set out in Dunn despite the fact that the Benefits Review Board in that case was considering different sections of the Longshore & Harbor Workers' Act. The Benefits Review Board's goal in Dunn was to create a fair means of setting specific dates for "time of injury" in occupational disease cases for several specific purposes. The problem with which the Benefits Review Board was dealing was that occupational diseases such as hearing loss are progressive diseases with various latency periods and various levels of awareness on the part of the diseased person that they may have a claim for benefits, as well as the problem of determining who was the responsible employer.

The Dunn case decided on two appropriate tests, "date of manifestation" and "date of last injurious exposure." The "date of manifestation" is used solely

to determine when the time for filing a claim begins to run. The "date of last injurious exposure" test is used to determine which employer was responsible to pay for the claim, as well as what date to use for establishing a baseline for payment of both lost wages and scheduled award benefits. To try to apply these tests to determine whether an award for hearing loss benefits is appropriate in this case is an exercise in futility and fiction.

The Administrative Law Judge and the Benefits Review Board did conclude that there was some question as to whether Mr. Tisdale was aware of his hearing loss prior to his fall on April 14, 1977. However, more importantly, the Administrative Law Judge and the Board also concluded that Mr. Tisdale did suffer noise-induced, work-related hearing loss in addition to whatever damage to his hearing in his left

ear which may have been caused by the 1977 fall. There was no factual finding, nor could there have been under the medical evidence, that Mr. Tisdale did not suffer from any hearing loss disability prior to his fall. The majority Court of Appeals opinion erroneously read the findings of fact of the Administrative Law Judge as indicating that there was some factual basis for concluding that no noise-related loss was present. Their denial of benefits was based on this erroneous conclusion.

Therefore, if the Supreme Court concludes that only such disability as pre-existed the totally disabling injury is compensable as a scheduled award, then the case must be remanded back to the Administratiave Law Judge for a specific determination as to the extent of disability which existed prior to Mr. Tisdale's fall at work on April 14, 1977.

C. Conclusion

Under either of the above analyses, this claim should be remanded for a determination of appropriate benefits. The issue which the Supreme Court must decide is whether the claim should be limited to loss of function existing prior to or prior to and concurrent with the totally disabling injury. We believe the Pepco decision demands the latter.

APPENDIX

I. Memorandum Decision, United States Court Of Appeals For The Ninth Circuit, Cause Nos. 81-7178, 81-7227, Filed December 16, 1982.

II. Decision And Order From Steven E. Halpern, Administrative Law Judge, Dated July 18, 1979.

III. Decision And Order From Benefits Review Board, Tisdale v. Owens-Corning, Reported at 13 BRBS 167 (1981).

DATED this 8th day of March, 1983.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER

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APPENDIX

FILED: Dec. 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANTON A. TISDALE, Petitioner, vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, et al., Respondents.	)	NO. 81-7178
OWENS-CORNING FIBERGLASS CO., AETNA CASUALTY INSURANCE CO., Petitioners, vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, et al., Respondents.	)	NO. 81-7227 MEMORANDUM

Appeal from the Benefits Review Board
Argued and submitted April 7, 1982

Before: HUG and SKOPIL, Circuit Judges;
SCHWARZER,* District Judge

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

Tisdale appeals the denial by the Benefits Review Board ("the Board") of his claim under the Longshoremen's and Harbor-workers' Compensation Act ("the Act") for a "schedule" award (33 U.S.C. § 908(c)(13)) in addition to permanent total disability payments (33 U.S.C. § 908(a)). Owens-Corning appeals the Board determination that, if a "schedule" award were to be granted, Owens-Corning rather than Lockheed would be liable. We affirm the decision of the Benefits Review Board denying the schedule award.

DISCUSSION

A. Standard of Review.

"The findings of fact in the decision by the Board under review shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951). "The court of appeals scrutinizes

Board decisions for errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327, 1329 (9th Cir. 1980). See Walker v. Universal Terminal & Stevedoring Corporation, 645 F.2d 170, 172-73 (3d Cir. 1981).

B. Date of Hearing Loss.

There are several possible tests for determining the date of injury of an occupational disease. Each test serves a different purpose and one or more of the tests may be applied in a given case. The Board adopted this flexible approach in Dunn v. Todd Shipyards Corp., 13 BRBS 647, 655 BRB No. 78-510 (1981). Finding that "time of injury" has different meanings under the Act, the Board concluded that the application of a single definition of time of injury would denegrate the purposes of

the provisions of the Act. Id. at 655.

In Dunn, the Board ruled that the date of injury for section 10 purposes in fixing the wage for computing an award in occupational disease cases is the date of last exposure to injurious stimuli. Id. at 667. This test is also applied to determine which employer should be assessed for an award. Id. at 663; Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir.), cert. denied, sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955).

The date of manifestation test is applied to determine if a claim has been timely filed under sections 12 and 13. 33 U.S.C. §§ 912(a), 913(a); Dunn, 13 BRBS at 654.

We need not decide which of the several alternative tests is the appropriate one in this instance, as under any of the alternatives Tisdale's schedule award

is precluded.[1] Under the date of manifestation test, the date of the injury was in May 1977, when the doctor discovered the hearing loss and "the disease became manifest through medical advice."[2] See Stark v. Bethlehem Steel Corp., 5 BRBS 186 (1976). Under the date of last exposure to injurious stimuli test, see Cardillo, 225 F.2d at 146, the date of injury would be April 14, 1977, Tisdale's last day at work at Owens-Corning. The Board found that Tisdale was last exposed to injurious noise while working at Owens-Corning. We uphold this finding as supported by substantial evidence. There was testimony that a noise factor was present at Owens-Corning, though a lesser nature than at Lockheed, and no evidence was presented to show the noise was not injurious.

The third alternative test utilizes the date of disability. Tisdale claimed that he had a hearing loss prior to the

accident of April 14, 1977, but was not aware that it was job-related. However, there is substantial evidence to support the Board's finding that Tisdale suffered no disability due to hearing loss until his totally disabling injury on April 14, 1977. There was evidence that Tisdale had reported to his physician that he had no hearing difficulty prior to this accident. As there is substantial evidence in the record, we must uphold the Board's determination that Tisdale was not aware of his hearing loss until after April 14, 1977, the date of the totally disabling injury.[3]

Since the date of the hearing loss did not occur prior to the totally disabling injury we affirm the Board's conclusion that Tisdale is not entitled to an independent schedule award on the basis of a prior disabling injury.

C. Propriety of Concurrent Disability Awards.

Tisdale contends that, even if he is unable to receive a schedule award for a prior partially disabling injury, he is entitled to receive concurrent payments for concurrent permanent partial disability and permanent total disability, relying on Hastings v. Earth Satellite Corporation, 628 F.2d 85, 91 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980). See also Morgan v. Marine Corps Exchange, 10 BRBS 442 (1979).

The Board has held that a schedule award cannot coincide with compensation for total disability. See Rupert v. Todd Shipyards Corporation, 239 F.2d 273, 276-77 (9th Cir. 1956) (compensation for permanent total disability precludes additional schedule award); Collins v. Todd Shipyards Corporation, 5 BRBS 334, 338 (1977) (compensation for scheduled injury may not be superimposed upon temporary total disability payments); James v. Bethlehem Steel Corporation, 5 BRBS 707, 712 (1977) (dis-

allowing overlapping payments for scheduled hearing loss and temporary total disability award for asthma). See also Jacksonville Shipyards, Inc. v. Dugger, 587 F.2d 197, 198 (5th Cir. 1979) (in case of permanent total disability, claimant not limited to schedule award); American Mutual Insurance Co. of Boston v. Jones, 426 F.2d 1263, 1266 (D.C. Cir. 1970) (claimant not limited to schedule award in case of permanent total disability). Compare Aerojet-General Shipyards, Inc. v. O'Keeffe, 413 F.2d 793, 795 (5th Cir. 1969) (dicta noting the possible consequences of disabilities from separate injuries).

In Hastings, the D.C. Circuit determined that the claimant was entitled to concurrent permanent total and permanent partial disability payments in order to fairly compensate him for loss in wage-earning capacity. Hastings may be distinguished from the instant case in that

Tisdale seeks a schedule award under section 908(c)(13) where economic loss is presumed. In Hastings, the claimant was receiving a section 8(c)(21) award where he had to establish loss in wage-earning capacity and where a figure was established for the loss. Concurrent awards in the present case, unlike Hastings, would not merely compensate Tisdale for established loss of earning capacity, but would amount to double recovery.[4]

We conclude that because payments for the totally disabling injury of April 1977 compensated Tisdale for the hearing loss for which he now seeks additional payment, recovery should be limited to total disability payments. As we affirm denial of the schedule award it is unnecessary to address Owens-Corning's claim that it should not be liable for payments.

AFFIRMED.

FOOTNOTES

[1] The determination of the appropriate test, if that issue were before us, would begin with the Board's decision in Dunn v. Todd Shipyards Corp., 13 BRBS 647, BRB No. 78-510 (1981).

[2] We might agree with the dissent that an injury from noise in the work place would not occur in the quiet of the doctor's office. The Board concluded, however, that no compensable disability existed prior to the disabling fall. The manifestation test, as discussed above, was properly applied to determine that the claim, if ultimately established, was timely filed. Dunn v. Todd Shipyards Corp., 13 BRBS 647, 656 (1981); Stark v. Bethlehem Steel Corp., 5 BRBS 186 (1976).

[3] The determination was a question of conflicting evidence and credibility, which the hearing officer resolved against Tisdale. We are not free to overturn such determinations when they are supported by substantial evidence. Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335 (9th Cir. 1978).

The finding is not contrary to the presumption of compensability, 33 U.S.C. § 920, because the finding was based on evidence that rebutted the presumption.

[4] The recent Supreme Court decision of Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980) rejected the idea that the "sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries," noting

> "None of the categories of disability covered by the LHWCA authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings. It therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers."

Potomac Electric Power Co., supra, at 281-82.

Consistent with this point of view, the court further noted that "since the Section 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." Potomac Electric Power Co., supra, at 277, n. 17.

Tisdale v. Director, OWCP,
Nos. 81-7178/7227

FILED: Dec. 16, 1982

HUG, Circuit Judge, dissenting:

I respectfully dissent, essentially for the reasons expressed in the dissenting opinion of Administrative Appeals Judge Julius Miller in the decision of the Benefits Review Board, Tisdale v. Owens-Corning Fiber Glass Company, BRB, Nos. 79-518 and 79-518A.

It is clear that when an accident results in a scheduled disability and also permanent total disability, the claimant may not recover both the scheduled benefit under section 8(c)(1)-(20) and the permanent total benefit under section 8(a). Rupert v. Todd Shipyards Corp., 230 F.2d 273 (9th Cir. 1956). However, it is equally clear that if an employee is injured and becomes entitled to a scheduled

benefit under section 8(c)(1)-(20), and later is injured in a second accident and is permanently totally disabled, the employee may recover his full benefits under section 8(a), in addition to the scheduled benefit under section 8(c)(1)-(20). This is apparent from the rationale of Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980).

A partial loss of hearing is a permanent partial disability compensated under section 8(c)(13) and (19).[1] The crucial decision in this case, therefore, is the determination of the "date of injury" for the binaural loss of hearing due to noise at the work place. The ALJ found it was the day when the hearing loss became manifest through medical advice, that is, in May, 1977, a month after the April 14 totally disabling traumatic injury. I would agree with dissenting Judge Miller

that it tortures realistic thinking to conclude that the hearing loss "occurred in the serene atmosphere of a physician's office while claimant was being diagnosed." Tisdale, supra, dissenting opinion, p. 14 n.2. I realize of course, that the ALJ was applying a "manifestation" rule to establish a "date of injury," when actually the injury occurred gradually over a period of time through exposure to injurious noise at his place of employment. For the purpose of that determination, we are led to a ridiculous result. It is obvious that the binaural loss of hearing due to injurious noise at the workplace occurred before the fall from the scaffolding on April 14. Although there was medical evidence that the fall itself caused some injury to the left ear, which would not be compensable under section 8(c)(13) and (19), we are here concerned with the "date of injury" for the binaural loss of hearing from

exposure to injurious noise at the workplace.

The Board proposes a second possible "date of injury," being the last exposure to harmful stimuli. Although there is a finding that Tisdale was exposed to some noise at Owens-Corning, there is, however, no finding that he was exposed to "injurious" noise. Thus it is entirely possible that the last exposure to injurious stimuli was at Lockheed, where, as a boilermaker, he clearly was exposed to "injurious" noise. In any event, the last exposure to noise, even at Owens-Corning, was prior to his fall from the scaffolding, even though it may have been immediately before the fall on the same day.

The third rationale of the Board is that the "date of disability" should govern and it concluded that the "claimant suffered no disability due to hearing loss until he became totally disabled on April 14,

1977, in part due to problems with his left ear resulting from the fall, ..." It is apparent from the medical testimony that disability from the binaural hearing loss occurred prior to the fall. The extent of the disability may be in question, but not its existence.

The establishment of a "date of injury" after the fall from the scaffolding is artificial and unrealistic. It is apparent from the evidence that Tisdale suffered a binaural hearing loss from exposure to injurious noise at his place of employment and that this obviously occurred prior to his fall from the scaffolding. He is thus entitled to the scheduled benefits for that loss, in addition to the benefits under section 8(a).

I would reverse the Board and remand for a determination of an appropriate award, pursuant to section 8(c)(13) and (19), for the partial loss of hearing,

which occurred prior to the fall, and for a determination of whether the last exposure to "injurious" noise was at Lockheed or Owens-Corning, in order to assess the recovery against the appropriate employer.

---

[1] Page 1 Section 8(c) provides:

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> . . .
>
> (13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.
>
> . . .
>
> (19) Partial loss or partial loss of use: Compensation for perman-

ent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
San Francisco Regional Office
Suite 600 - 211 Main Street
San Francisco, California 94105

In the Matter of	
STANTON A. TISDALE Claimant	CASE NOS. 79-LHCA-1150-S 79-LHCA-1151-S
v.	OWCP NOS. 14-39257 & 14-31207
LOCKHEED SHIPBUILDING & CONSTRUCTION COMPANY Self-Insured Employer	
EMPLOYERS INSURANCE COMPANY OF WAUSAU Former Carrier for Lockheed	
OWENS CORNING FIBER GLASS COMPANY Employer	
AETNA CASUALTY & SURETY COMPANY Carrier for Owens	

Paul W. Whelan
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540 Central Building
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For the Claimant

Robert L. Brousseau
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For the Employer Lockheed

Russell Metz
Attorney at Law
Smart, Biehl & Martin
1540 Washington Building
Seattle, Washington 98101
For the Employer
and Carrier

Before: STEVEN E. HALPERN
Administrative Law Judge

DECISION AND ORDER

Findings and Conclusions

Claimant in this Longshore matter is totally disabled as a result of injuries sustained in a work-connected accident while in the employ of Respondent Owens Corning on April 14, 1977. Since that time he duly has been paid compensation for temporary and/or permanent total disability.

The claim presently pending is for a schedule award for a binaural hearing loss which allegedly arose prior to the accident of April 14, 1977, as a result of work-connected exposure to noise over a period of years.

Responsible Employer

It is well settled in progressive disease cases (including hearing loss) that the Employer during the last employment in which Claimant was exposed to injurious stimuli is liable for the full amount of such compensation and other

benefits as may be awarded.

This Claimant worked for Respondent Lockheed from March 20, 1974 to March 11, 1977, under noisy conditions. Thereafter he worked for Respondent Owens Corning from March 29, 1977 until April 14, 1977. While the noise level in the latter employment was of a lesser nature it is beyond question that a noise factor was present (Tr. 25-8, 33-5); there is no basis for a finding that Claimant was not subjected to stimuli injurious to his hearing; and, I presume that he was. Accordingly, I conclude that if an award is appropriate it lies against Owens Corning and its carrier Aetna Casualty.

During the time Claimant was in its employ Respondent Owens Corning was a sub-contractor of Respondent Lockheed. Since it is apparent that Owens Corning was in compliance with section

32(a) of the Act, pursuant to section 4(a) of the Act Respondent Lockheed and its Carrier are not subjected to liability herein by virtue of said relationship.

NOTE: By consent, Employers Insurance Company of Wausau hereby is joined as a party nunc pro tunc and the appearance of Robert L. Brousseau, Attorney at Law, entered on its behalf. (6/26/79 letter from Mr. Brousseau).

Time Bar

In the April 14, 1977, accident Claimant inter alia struck his head and suffered a left ear injury for which a claim was filed on April 14, 1977.

Thereafter, the claim was pursued as for "a binaural, noise-induced hearing loss" (Ex. C-6, 3/27/78 letter from Claimant's then representative to the Department of Labor claims examiner).

Since Claimant was not medically

advised of the nature and extent of his hearing loss and its job-related nature until May 1977 (Tr. 6), I find and conclude that a claim was timely filed; and, no other section of the Act has been asserted to bar the action.

The Merits

The instant claim will be productive of additional compensation payments to Claimant only to the extent that the evidence establishes that Claimant sustained an injury in the nature of a noise induced hearing loss prior to April 14, 1977, since it is well settled that compensation payments under a schedule award may not overlap compensation payments for total disability (temporary or permanent) and Claimant has been totally disabled since April 14, 1977.

The medical evidence of record establishes that Claimant has a right ear hearing loss, noise induced and job-relat-

ed; and, a left ear hearing loss, at least partially noise induced and job-related.

Claimant has testified that he was aware of a hearing loss prior to the April 14, 1977, accident. However, in view of the fact that he previously had reported to his physician that he had no hearing difficulty prior to said accident (Ex. C-3, 6/8/77 report of G.K. Chan, M.D.; Ex. C-5, Nov. 13, 1978, report of T.S. Rees, audiologist) I am unable to credit said testimony. Further, in connection with Claimant's credibility, I note that the comments of the audiologist who examined him on behalf of his attorney are clearly suggestive of manipulative behavior by Claimant in connection with his hearing loss (Ex. C-5).

As I assess the evidence Claimant was first made aware of the nature of his condition and its relationship to his exposure to noise at work by his physician

in May 1977 (Tr. 6; Ex. C-6; Ex. C-3, 6/8/77 report of G.K. Chan, M.D.); and, the Board has held in Stark v. Bethlehem Steel Corporation, 5 BRBS 186, 6 BRBS 660, 10 BRBS 350, that the date of the "injury" for compensation purposes is the date when the disease became manifest through such medical advice.

Therefore, since Claimant's asserted schedule injury cannot be said to have occurred until after the separate totally disabling injury of April 14, 1977, for which he is receiving full benefits, he is entitled to no additional award.

Prosecution of this claim has not been unavailing to Claimant however since, under the evidence before me, and based upon my prior findings, I further find and conclude that Claimant is entitled to medical benefits in connection with his noise-induced binaural hearing loss, which Respondents Owens Corning and Aetna Casual-

ty hereby are ORDERED to provide.

STEVEN E. HALPERN
Administrative Law
Judge

Dated: July 18, 1979
San Francisco, California

SEH:scm

CERTIFICATE OF FILING AND SERVICE

I certify that on July 23, 1979 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Fourteenth Compensation District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Stanton A. Tisdale
6735 - 7th N.W.
Seattle, WA 98177
Claimant

Lockheed Shipbuilding & Constr. Co.
2929 - 16th Ave. S.W.
Seattle, WA 98124

Owens Corning Fiberglas Co.
1313 S.W. Hanford St.
Seattle, WA 98124
Employer

Mr. Paul W. Whelan
Schroeter, Goldmark & Bender
Attorneys at Law
540 Central Bldg.
Seattle, WA 98104
Counsel for Claimant

Lockheed Ship. & Constr. Co. - SELF-INSURER
Owens Corning Fiberglas Co. - Aetna Cas. & Surety Co.
Insurance Carrier

Mr. Russell Metz
Smart, Biehl & Martin
Attorneys at Law
1540 Washington Building
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Counsel for Insurance Carrier
(Aetna Cas. & Surety Co.)

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Walsh, Margolis & Brousseau
Attorneys at Law
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Counsel for Self-Insurer
(Lockheed)

A copy was also mailed by regular mail to the following:

Judge STEVEN E. HALPERN
Office of Administrative Law Judges
U.S. Dept. of Labor
211 Main Street, Room 600
San Francisco, WA 94105

Associate Solicitor of Labor
for Employee Benefits
U.S. Dept. of Labor
NDOL, Suite N-2716
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Washington, D.C. 20210

Director, Office of Workers' Compensation Programs (LHWCA)
U.S. Dept. of Labor
NDOL Building, Room C-4315
200 Constitution Ave.
Washington, D.C. 20210

Deputy Commissioner
14th Compensation District
U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

GPO 895-763
Form LS-19 (Rev. Aug. 1975)

STANTON A. TISDALE,	)	
	)	
Claimant-Petitioner	)	BRB Nos. 79-518 & 79-518A
	)	
v.	)	
	)	
OWENS-CORNING FIBER GLASS COMPANY	)	
	)	
and	)	
	)	
AETNA CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY	)	DECISION AND ORDER
	)	
and	)	
	)	
EMPLOYER'S INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier-Respondents	)	
	)	
STANTON A. TISDALE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
OWENS-CORNING FIBER GLASS COMPANY	)	
	)	
and	)	
	)	

AETNA CASUALTY)
INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
and)
)
LOCKHEED SHIPBUILDING)
AND CONSTRUCTION)
COMPANY)
)
and)
)
EMPLOYER'S INSURANCE)
OF WAUSAU)
)
Employer-Carrier)
Respondents)

Digest Section	Syllabus
3002	"The employer responsible for the payment of compensation for disability in an occupational disease case is the last employer at which claimant was exposed to harmful stimuli prior to the date the claimant became aware that he was suffering from an occupational disease. It is irrelevant that claimant may not have actually sustained a distinct aggravation of his injury at the last place of employment."
1401; 2100; 2251	After using the date of last exposure to injurious stimuli, date of disability, and date of manifestation tests, the Board concluded that the date of injury due to claimant's noise-induced

hearing loss did not occur prior to his becoming totally disabled from a work-related accident.

1402; 1404[b]; 1404[c] A claimant who is permanently totally disabled while receiving an award for permanent partial disability under section 8(c)(21), based on loss in wage-earning capacity, must continue to receive the concurrent awards to be fully compensated for the loss. Claimant's permanent total disability award under section 8(a), however, would be based on his remaining wage-earning capacity following his section 8(c)(21) award.

1404[c]; 1406 Where claimant was already receiving permanent total disability compensation, due in part to an injury under the schedule, and where total disability benefits presuppose a permanent loss of all earning capacity, the Board denied claimant an additional schedule award for hearing loss. Allowing an additional schedule award would run counter to the wage compensation principles of the Act by applying a tort principle.

Appeals from the Decision and Order and Order Awarding Attorney Fees of Steven D. Halpern, Administrative Law Judge, United States Department of Labor.

Paul W. Whelan (Schroeter, Goldmark & Bender), Seattle, Washington, for the claimant.

Russell A. Metz (Lee, Smart, Cook, Biel & Hartin, P.S., Inc.), Seattle, Washington, for Owens-Corning Fiberglass Company and Aetna Casualty and Surety Company.

Robert L. Brousseau (Walsh, Margolis & Brousseau), Seattle, Washington, for Lockheed Shipbuilding & Construction Company and Employer's Insurance of Wausau.

BEFORE: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This case involves an appeal by the claimant and a cross-appeal by Owens-Corning Fiberglass Company (hereinafter, Owens-Corning) from the Decision and Order and Order Awarding Attorney Fees (79-LHCA-1150-S and 79-LHCA-1151-S) of Administrative Law Judge Steven E. Halpern pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter, the Act). This case raises the question of whether a claimant who is

receiving permanent total disability benefits under Section 8(a) can also receive an award for permanent partial disability under the schedule for hearing loss, Section 8(c)(13). The Board heard oral argument in Seattle, Washington, on July 29, 1980.

The administrative law judge found that claimant had established that he has a work-related binaural hearing loss. However, he found that claimant failed to prove that the date of this injury, which the administrative law judge equated with the date it became manifest to claimant through medical advice, occurred prior to April 14, 1977. That was the date claimant sustained a traumatic injury at work with Owens-Corning and became permanently totally disabled. The judge therefore concluded that claimant was not entitled to a schedule award for the hearing loss, because he was already receiving permanent

total disability benefits, and a schedule award may not overlap compensation for total disability. However, he awarded claimant medical benefits and an attorney's fee, holding that Owens-Corning -- not Lockheed Shipbuilding & Construction Company (hereinafter, Lockheed) -- was the employer responsible for payment of these items.

Claimant appeals, asserting that his hearing loss injury occurred prior to the traumatic injury of April 14, 1977, and that Lockheed is the responsible employer, since claimant was not exposed to injurious noise levels at Owens-Corning. Claimant contends that he is therefore entitled to a schedule award pursuant to Section (8)(c)(13), 33 U.S.C. § 908(c)(13), in addition to permanent total disability benefits pursuant to Section 8(a), 33 U.S.C. § 908(a). Owens-Corning cross-appeals, arguing that claimant failed to raise the

issue of entitlement to medical benefits at the hearing below and that the administrative law judge's decision of this issue should be vacated and remanded. It also argues that Lockheed is the employer responsible for benefits due for claimant's hearing loss. Owens-Corning also contends that claimant was permanently totally disabled when his hearing loss injury occurred and therefore cannot receive an additional award. In response to these appeals, Lockheed also argues that claimant cannot receive a schedule award in addition to permanent total disability benefits, but contends alternatively that Owens-Corning is the employer responsible for any benefits resulting from claimant's occupational hearing loss.

The Board's scope of review is limited. Upon its review of a case, the Board must affirm the decision of an administrative law judge if it is supported by

substantial evidence in the record considered as a whole, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The facts in this case are the following: Claimant worked for Lockheed in its plate shop from 1974 to March 11, 1977. On March 29, 1977, claimant began working for Owens-Corning, a subcontractor at the Lockheed facility. Claimant worked aboard ship driving studs until April 14, 1977, when he sustained multiple injuries, including a perforated left ear drum, as a result of a fall from a scaffold. Claimant has not returned to work and has been totally disabled since these injuries. Owens-Corning paid temporary total disability benefits from April 14, 1977, to February 10, 1978, and has paid permanent total disability benefits thereafter. In May 1977 claimant had a hearing evaluation

and was diagnosed as having a binaural hearing loss due to continued exposure to noise. Claimant subsequently sought benefits under Section 8(c)(13) for an occupational hearing loss, in addition to permanent total disability benefits for his traumatic injury.

The first issue we address is the contention by claimant and Owens-Corning that the administrative law judge erred in finding that Owens-Corning, not Lockheed, is the responsible employer, if any compensation or medical benefits is due. They contend that during the less than two week period claimant worked for Owens-Corning he was exposed to relatively little noise and that this exposure is de minimis compared to the substantial period of employment by Lockheed under noisy conditions. Thus, they contend, the last exposure at Owens-Corning had no causal relation to the noise-induced hearing loss under the "last

injurious exposure" rule in Traveler's Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied, 350 U.S. 913 (1955).

We reject these contentions and affirm the administrative law judge's finding that Owens-Corning is the responsible employer. Claimant was clearly exposed to noise while employed by Owens-Corning, his last employer. See Hearing Transcript at 25-29, 35. It is irrelevant that working conditions at Lockheed prior to claimant's employment at Owens-Corning may have been noisier. The employer responsible for the payment of compensation for disability in an occupational disease case is the last employer at which claimant was exposed to harmful stimuli prior to the date the claimant became aware that he was suffering from an occupational disease. See Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 440

U.S. 911 (1979). It is irrelevant that claimant may not have actually sustained a distinct aggravation of his injury at the last place of employment. Whitlock v. Lockheed Shipbuilding & Construction Co., 12 BRBS 91, BRB No. 79-258 (1980). The employer responsible under the Act is the one where claimant was last exposed to dangerous stimuli. The administrative law judge correctly concluded that Owens-Corning was the responsible employer if any benefits were due for claimant's occupational hearing loss.

The second issue we address is claimant's contention regarding the date of the injury due to the occupational hearing loss. Specifically, claimant asserts that the administrative law judge erred in using Stark v. Bethlehem Steel Corp., 5 BRBS 186, BRB No. 75-253 (1976), to find that the date of the hearing loss injury was the date of manifestation, i.e., May 1977 when

a physician first told claimant his hearing loss was work-related.

Without necessarily agreeing with his legal reasoning, we affirm the administrative law judge's conclusion that the date of the injury due to noise-induced binaural hearing loss did not occur prior to claimant's becoming totally disabled on April 14, 1977, the date he fell from the scaffold. Using any of the three alternatives we see for determining the date of injury of an occupational disease, the conclusion is the same in this case. First, if the date of injury is the date of last exposure to injurious stimuli (extending the reasoning in Traveler's Insurance Co. v. Cardillo, supra), then that date is April 14, 1977, claimant's last day at work. Second, using a test of the date of disability, claimant suffered no disability due to hearing loss until he became totally disabled on April 14, 1977, in part due to

problems with his left ear resulting from the fall, i.e., tinnitus, perforated ear drum, and some degree of hearing loss. See Hearing Transcript at 12, Cl. Ex. 2 (Dr. Chan's letter of June 8, 1977), Cl. Ex. 4. Third, using the date of manifestation, as the administrative law judge did, results in a date of injury occurring after April 14, 1977.[1]

The next issue we address is whether claimant is entitled to a schedule award for hearing loss in addition to compensation for permanent total disability. Since we have affirmed the administrative law judge's finding that the date of claimant's "injury" due to hearing loss was on or after April 14, 1977, any award under the schedule would run from that date and would overlap with compensation payments for total disability which claimant has been receiving since April 14, 1977. We affirm the administrative law judge's holding

denying claimant a schedule award, because a schedule award cannot coincide with a total disability award, where the total disability is in part due to an injury under the schedule. In Rupert v. Todd Shipyards Corp., 239 F.2d 273 (9th Cir. 1956), the court held that, where a claimant was awarded benefits for temporary total and then permanent total disability for serious injuries sustained in a fall, including serious facial disfigurement, he was not entitled to an additional schedule award under Section 8(c)(20) for facial disfigurement. The court reasoned that an award for permanent total disability presupposes a permanent loss of all earning capacity. By the clear language of the statute, an award under the schedule, Section 8(c)(1-20), is applicable only to cases of permanent partial disability. The mandatory language in section 8(c), an employee "shall be paid," means that a

schedule award shall be paid, provided the employee is not already reciving the maximum amount of compensation payable under the Act for a disability that is both total and permanent.[2] Allowing an additional schedule award would run counter to the wage compensation principles of the Act by applying a tort principle. Further, in Collins v. Todd Shipyards Corp., 5 BRBS 334, BRB Nos. 76-177/A (1977), the Board held that, where a claimant was receiving benefits for temporary total disability due to fracture of both feet, he was not entitled to a schedule award for the subsequent loss of his right foot when it was amputated. In James v. Bethlehem Steel Corp., 5 BRBS 707, BRB Nos. 76-130/A (1977), the Board held that compensation for a scheduled injury cannot overlap with an award for temporary total disability. It vacated and remanded the administrative law judge's decision and order granting a

schedule award for hearing loss commencing February 13, 1974, and a temporary total award commencing April 9, 1974, for a pre-existing asthma condition aggravated by the hearing loss. See also Paiement v. Bath Iron Works Corp., 11 BRBS 767, BRB No. 79-288 (1980).

Claimant contends that Hastings v. Earth-Satellite Corp., 8 BRBS 519, BRB Nos. 77-598 A/B (1978), aff'd in pertinent part, 628 F.2d 85 (D.C. Cir. 1980), supports the proposition that a claimant may receive concurrent permanent total and permanent partial disability awards. Hastings applies only to cases where claimant sustains a permament partial disability for which he is compensated under Section 8(c)(21) for a loss in wage-earning capacity. In these cases, where claimant later sustains a permanent total disability, the prior permanent partial 8(c)(21) award continues concurrently with an award under

Section 8(a). However, claimant's permanent total disability award is based on his remaining wage-earning capacity following his 8(c)(21) award. See also Morgan v. Marine Corps Exchange, 10 BRBS 442, BRB Nos. 78-266 A/B (1979). Thus, in such cases claimant receives two concurrent awards but is compensated for no more than the diminution in his earning capacity from both injuries. A claimant who is permanently totally disabled while receiving a Section 8(c)(21) award based on loss in wage-earning capacity must continue to receive the concurrent awards to be fully compensated for his loss.

The concurrent award scheme would not yield an equitable result where claimant's permanent partial disability is compensated under the schedule. In a schedule case, claimant does not demonstrate a loss in wage-earning capacity; the economic loss is presumed. No figure is established for

claimant's post-injury wage-earning capacity. Therefore, a claimant who sustains a scheduled injury followed by an injury which renders him permanently totally disabled would receive two-thirds of his average weekly wages for the specified number of weeks plus permanent total disability benefits of two-thirds of this same average weekly wage for an unlimited period. The average weekly wage on which the total award is based would not reflect any actual diminution in wage-earning capacity. Thus, concurrent receipt of the two awards would give a claimant double recovery and would not comport with the Act's compensation scheme, which rests on the proposition that a permanently totally disabled claimant is to receive compensation only in relation to the amount of his loss. Therefore, the analysis of Hastings and Morgan cannot properly be applied where claimant's permanent partial disability is

compensated under the schedule.

The last issue we address is the administrative law judge's award of medical benefits and an attorney's fee. On cross-appeal, Owens-Corning contends that claimant never raised the issue of medical benefits before the administrative law judge. He nevertheless awarded the benefits without ever giving Owens-Corning the opportunity to raise any Section 8(d) defenses. (It alleges that its defense is that claimant never requested payment of his medicals beyond those it had already paid.) Therefore, Owens-Corning argues that the award should be vacated.

We agree. Claimant did not raise the issue of medical benefits at the hearing below (see Hearing Transcript at 5-6) and did not prove the amount of his medical bills. We have held that an employer must be notified and given an opportunity to present argument and evidence on a new

issue which warrants consideration and which arises during the course of the hearing. Where the administrative law judge fails to so notify the employer but decides the issue in his decision and order, it must be vacated. Collins v. Todd Shipyards Corp., 5 BRBS 334, BRB Nos. 76-177/A (1977); James v. Bethlehem Steel Corp., 5 BRBS 707, BRB Nos. 786-130/A (1977); 20 C.F.R. § 702.336. Accordingly, we vacate the award of medical benefits and remand the issue to the deputy commissioner. (If any medical benefits are due, Owens-Corning is the responsible employer, in accordance with our discussion of the first issue.)

The administrative law judge awarded an attorney's fee on the theory that claimant was "successful" under Section 28(a) by winning medical benefits. Since we are vacating the award of medical benefits and remanding the issue, we must

also vacate the award of attorney's fees.

SO ORDERED.

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[1] The administrative law judge discredited claimant's testimony that he was aware of a hearing loss prior to the accident of April 14, 1977. The Board will not interfere with this credibility determination. Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978).

[2] We disagree with Judge Miller's contention in his dissent that language in Potomac Electric Power Co. v. Director, 49 U.S.L.W. 4063 (Dec. 16, 1980), indicates that the right to a schedule award vests immediately upon loss. The Supreme Court did not directly consider the issue at hand. It was considering only the limited question of whether in cases of permanent partial disability the schedule benefits are exclusive. 49 U.S.L.W. at 4066, fn. 19. The Court did note that "since the Section 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." 49 U.S.L.W. at 4066, fn. 17. Finally, the Court stated that the Longshore Act does not purport to provide complete compensation for the wage earner's economic loss. 49 U.S.L.W. at 4067.

MILLER, Administrative Appeals Judge, dissenting:

I must respectfully, but vigorously, dissent from my colleagues' decison which affirms an administrative law judge's decision that is not supported by substantial evidence, irrational, and not in accordance with recent developments in the law.

The Supreme Court in Potomac Electric Power Co. v. Director, OWCP, 49 U.S.L.W. 4063 (Dec. 15, 1980) (hereinafter, PEPCO) has held that payments under the schedule of Section 8(c) are mandatory and that an employee has no right to elect whether to proceed under the schedule or under Section 8(c)(21) by showing a greater loss of earning capacity. In reaching its decision the Court emphasized that the language of Section 8(c) "mandates that the compensation prescribed by the schedule 'shall be paid to the employee, as follows.'" 49

U.S.L.W. at 4065. The Court later said that "even though a scheduled injury may have no actual effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid." Id. at 4067 (emphasis added).

In my view the language of the Court clearly demonstrates that the amounts payable under the schedule become vested immediately upon loss as prescribed therein without any other considerations such as claimant's wage-earning capacity or compensation because of other conditions. Therefore, considering the facts of this case, if claimant were working at the time of the hearing loss, earning full wages, he would be entitled to those full wages in addition to the schedule amount and there would be no issue of double recovery. Thus, the fact that he has sustained permanent total disability from another

injury cannot dismiss his right to compensation under the schedule which must be paid. Clearly, if claimant never loses a day of work as a result of the hearing loss, he is entitled to his benefits. The fact that he has sustained a separate disabling injury should have no effect on his entitlement.[1]

The holding in PEPCO is not dispositive of the instant case since PEPCO involved only one injury (which was under the schedule) and claimant was thus limited to a mandatory award under the schedule. The instant case involves two injuries (one under the schedule and one under Section 8(a)) and therefore, the rationale of PEPCO is dispositive and compels the conclusion that claimant must receive the mandatory award for hearing loss under the schedule without consideration of any loss in wage-earning capacity.[2]

Claimant is additionally entitled to

an award of permanent total disability for his traumatic injury under Section 8(a) based on his remaining wage-earning capacity as diminished by prior partial losses of wage-earning capacity compensated under Section 8(c)(21). Hastings v. Earth-Satellite Corp., 8 BRBS 519, BRB Nos. 77-598 A/B (1978), aff'd in pertinent part, 628 F.2d 85 (D.C. Cir. 1980); Morgan v. Marine Corps Exchange, 10 BRBS 442, BRB Nos. 78-266 A/B (1979). Claimant has no prior Section 8(c)(21) awards, and, in fact, cannot receive a Section 8(c)(21) award for his injury under the schedule. PEPCO. Therefore, claimant is entitled to an award for permanent total disability under Section 8(a) based on his full average weekly wage.

The majority ignores the rationale of the Supreme Court in PEPCO by refusing to allow the mandatory scheduled award. The majority ignores the rationale of Hastings

and Morgan in refusing to allow the permanent partial award to survive the award of permanent total disability. My colleagues must then base their decision on apparent belief that total compensation which is not directly related by a factor of 66 2/3 percent to claimant's loss in wage-earning capacity is inconsistent with the Act. But as the Supreme Court stated in PEPCO:

> Unless an injury results in a scheduled disability, the employee's compensation is dependent upon proving a loss of wage-earning capacity; in contrast, even though a scheduled injury may have no actual effect on an employee's capacity to perform a particular job or to maintain a prior level of income, compensation in the schedule amount must be paid.

49 U.S.L.W. at 4067 (emphasis added).[3]

Therefore, I would vacate the decision of the administrative law judge which denies claimant the mandatory compensation based on loss of hearing and remand for the entry of an appropriate award. On remand,

it would be proper for the administrative law judge to determine whether Lockheed or Owens-Corning is the responsible operator with respect to the hearing loss,[4] and further consider the applicable medical benefits and attorney's fee.

Dated this 31st
day of January 1981

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[1] If the scheduled loss results in permanent total disability, the situation is different in that claimant is not limited to the schedule under the circumstances. See PEPCO, 49 U.S.L.W. at 4066 N. 17. My colleagues' categorization of the schedule as irrelevant once permanent total disability is established, majority N. 2, supra, is absolutely true where, as in PEPCO, claimant suffers only one injury. The majority attempts to rely on statements in PEPCO quite clearly pertaining only to claimants with one injury. The quote from PEPCO in N.2 of the majority opinion appears in N. 17 of the PEPCO opinion, 49 U.S.L.W. at 4066, wherein the Court was discussing American Mutual Insurance Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970), a case which held that a scheduled injury can give rise to an award for permanent total disability. Neither does Rupert v. Todd Shipyards Corp., 239 F.2d 273 (9th Cir. 1956) support the majority's construction. Rupert also involved only one incident

which was totally disabling. 239 F.2d at 274. There is no support in the Act or in judicial decisions supporting the failure to distinguish multiple incidents from sole incidents. Cf. Paiement, 11 BRBS 767 (all maladies considered by the Board arose out of same accident).

Moreover, in relying on prior Board decisions such as Collins v. Todd Shipyards Corp., 5 BRBS 334, BRB Nos. 76-177/A (1977) and James v. Bethlehem Steel Corp., 5 BRBS 707, BRB Nos. 76-130/A (1977) as support for the proposition that a scheduled award may not overlap with an award of total disability, my colleagues fail to recognize that the holding in PEPCO mandating that scheduled awards must be paid according to the terms of the schedule represents a departure from prior Board case law. See PEPCO, 49 U.S.L.W. at 4066 NN. 17 and 18. See also the Board's subsequent decision after remand in Collins, supra, 9 BRBS 1015, where the Board applied pre-Pepco analysis to insure that claimant was fully compensated for both injuries. 9 BRBS at 1021. The Collins approach is no longer tenable, Pepco, 49 U.S.L.W. at 4066 n. 18, and Pepco now mandates the method by which claimant is compensated for both injuries.

[2] It is ludicrous to give serious consideration to the possibility that the hearing loss occurred on or after April 14, 1977, the date of claimant's totally disabling traumatic injury. The administrative law judge so found and my colleagues affirm. In affirming this finding, the majority, in effect, accepts the administrative law judge's conclusion that claimant's extensive hearing loss occurred in the serene atmosphere of a physician's office while claimant was being diagnosed.

The two alternative methods by which my colleagues attempt to rescue this conclusion are both equally unpersuasive. Even if the time of injury for purposes of determining the responsible operator (last exposure to injurious stimuli) applies, there is no evidence that claimant was exposed to injurious stimuli during the examination by the physician or at any other time after claimant left work. Nor is there any evidence of record that claimant's binaural loss of hearing occurred at the time of his traumatic injury. Since the medical evidence indicates that this injury only affected claimant's hearing in his left ear, it is absurd to conclude that there was not alredy an injury under the schedule, at the very least for loss of hearing in the right ear, before the traumatic injury. My colleagues recognize that claimant testified to being aware of a hearing loss before the traumatic injury. See majority n. 1, supra. There is no evidence, nor is there a rational explanation, attributing claimant's loss of hearing in both ears to his traumatic injury, examination in a physician's office, or even to his convalescence after leaving work. While the administrative law judge's factual findings are entitled to deference, we are not bound to accept an ultimate finding or inference if the decision discloses that it was reached in a manner which cannot be accepted as valid. Howell v. Einbinder, 350 F.2d 442 (D.C. Cir. 1965). Neither are we required to seek an irrational explanation which reaches the same result.

[3] It must be noted that the majority's reliance on the necessity to avoid an award greater than claimant's loss in wage-earning capacity is unfounded. Assuming

arguendo that claimant is entitled to an award under Section 8(c)(13) of the schedule for a binaural hearing loss of 36.67 percent, see Oral Argument Transcript at 11, then pursuant to Section 8(c)(19), claimant would receive a scheduled award of 66 2/3 percent of his average weekly wage for 73.34 (200 x 36.67 percent) weeks. Even if this entire award ran concurrently with an award for permanent total disability under Section 8(a), claimant would only receive 133 1/3 (2 x 66 2/3) percent of his average weekly wage for 73.34 weeks and 66 2/3 percent of his average weekly wage thereafter. Thus, unless future events terminate clamant's Section 8(a) award (see Sections 8(a), 8(d)(4) and 9) for permanent total disability within 146.68 (2 x 73.34) weeks, claimant will still receive less total compensation over the period of permanent total disability entitlement than claimant's loss in wage-earning capacity over this period. That this remote and speculative future possibility of termination within 146.68 weeks could be dispositive warrants no further comment. See also n. 4 infra.

Additionally, I note that total compensation in excess of 66 2/3 percent of claimant's loss of wage-earning capacity for some period of time is specifically contemplated by the Act.

It is true that "[n]one of the categories of disability covered by the [Longshoremen's and Harbor Workers' Compensation Act] authorizes recovery measured by the full loss of an injured employee's earnings; even those in the most favored categories may recover only two-thirds of the actual loss of earnings." PEPCO, 49 U.S.L.W. at 4067. However, the Act pro-

vides for compensation greater than 66 2/3 percent of lost wage-earning capacity when an employee falls in two categories, even though there is only one injury, and, further, the Act contemplates total compensation which can conceivably reach at least 100 1/3 percent of lost earnings. See Section 8(c) (authorizing awards for temporary partial disability and temporary total disability in addition to a scheduled award). The multiple injury situation is not addressed in Section 8(c), but the case law in Hastings, supra, and Morgan supra, allowing concurrent awards in a two injury context for permanent partial disability under Section 8(c)(21) and permanent total disability under Section 8(a) and PEPCO which mandates that a scheduled award for permanent partial disability must be paid irrespective of any loss in wage-earning capacity can only support the conclusion that where there are multiple incidents, a scheduled award for permanent partial disability must be allowed to run concurrently with an award for permanent total disability under Section 8(a).

[4] As I have discussed in n.2, supra, the record can only support the conclusion that an injury compensable under the schedule for loss of hearing occurred prior to the traumatic injury. The problem of identifying the responsible operator for the injury under the schedule exposes another incongruity in the majority's resolution. If claimant's hearing loss occurred on March 11, 1977 (the last day of employment for Lockheed), my colleagues would not allow any compensation under the schedule beyond claimant's totally disabling traumatic injury on April 14, 1977. However, should claimant recover from his traumatic injury

thus terminating the payments for permanent total disability, see Section 8(a), claimant may be left with a compensable hearing loss for which any claim will be time-barred. See Sections 13(a) and 22. See also Collins, supra, 9 BRBS at 1021. I find it impossible to reconcile this situation with the holding in PEPCO that compensation under the schedule must be paid.